BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY R. CHRISTY	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,793
BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals Administrative Law Judge John D. Clark's May 23, 2001, Award. The Appeals Board heard oral argument on December 4, 2001.

APPEARANCES

Claimant appeared by his attorney, Phillip B. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant was entitled to permanent partial general disability benefits based on a 5 percent functional impairment while he remained an employee of respondent and then after respondent terminated claimant he was entitled to 34.5 percent permanent partial general disability based on a work disability. The ALJ concluded respondent wrongfully terminated claimant for violation of its attendance policy. Accordingly, the ALJ found, after the wrongful termination, claimant was entitled to a higher work disability award.

On appeal, respondent contends claimant failed to comply with its attendance policy and was rightfully terminated for violation of that policy. Respondent further argues, since claimant's termination was for unexcused absences in violation of its attendance policy,

then claimant is limited to an award of permanent partial disability benefits based on a functional impairment and is not entitled to a work disability award. Respondent requests the Board to modify the Award and limit claimant's permanent partial general disability to a 3 percent award based on claimant's permanent functional impairment.

Conversely, claimant contends the Award is correct and he is entitled to a 34.5 percent work disability. In addition, claimant argues his termination was not justified because he was off work due to his work-related injury. Claimant argues the work-related absences are not considered unexcused absences under the respondent's attendance policy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the Award should be affirmed. The Board further finds that the Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Therefore, the Board adopts the ALJ's findings and conclusions as its own, as if specifically set forth herein.

The principal issue in this case is whether the respondent rightfully terminated claimant for unexcused absences in violation of its attendance policy. The test is whether the unexcused absences were made in bad faith or constituted a lack of good faith by claimant to retain employment such that a wage should be imputed.[1] Concerning that issue, the record contains the testimony of the claimant, Donald D. Brewer, respondent's third shift people's support representative, and Karen Weaver, respondent's labor relations manager, at the time of claimant's termination. The exhibits admitted into the record plus the testimony of all three of these individuals established that there was considerable confusion as to whether absences due to work-related injuries had to be certified under the Family Medical Leave Act (FMLA), excused by a worker's supervisor, excused through respondent's Central Medical facility, or excused through an injured worker's treating physician.

After claimant injured his low back in a fall at work on May 20, 1999, respondent provided conservative medical treatment for claimant's resulting low back strain. Claimant was returned to work and then on occasion missed work because of the pain and discomfort that continued in his low back. During the time claimant missed work, he

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[1] See Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); Gadberry v. R.L. Polk & Co., 25 Kan. App. 2d 800, 975 P.2d 807 (1997); Copeland v, Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997); Foulk v. Colonial Terrace, 20 Kan. App. 2d 27, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

received a variety of instructions from the respondent as to the proper procedure he should follow in obtaining an excuse for the work-related absences. For example, claimant testified he was told by his supervisor to go to the FMLA office and obtain an excuse for the absence. On the other hand, the FMLA office told him he had to go to Central Medical to be excused. Central Medical would then refer him back to his supervisor.

Before claimant injured his back on May 20, 1999, he experienced some attendance problems and had received a Notice of Corrective Counseling (NCC) for unexcused absences from his supervisor on October 1, 1998. Thereafter, on February 5, 1999, he received a Corrective Action Memo (CAM) for other unexcused absences. Then on December 16, 1999, claimant received another CAM for unexcused absences, and respondent argues in accordance with its attendance policy claimant was terminated. The December 16, 1999 CAM, indicated claimant was absent October 15, 20, 25, 1999, for 6.5 hours each day, .9 hours on November 2, 1999, and .9 hours on November 23, 1999. According to respondent's attendance policy, those absences if unexcused would constitute four infractions. Attendance is unacceptable when an employee accumulates any combination of infractions which equals or exceeds 2 full infractions within an 8 week period.

But claimant testified and the Proposed Termination form attached to the December 16, 1999, CAM also indicated that claimant's absences of October 15, 20, and 25, were the result of a work injury. Contained in respondent's attendance policy is a statement that any period of absence referred to in the policy shall not be considered an infraction if it is the result of an industrial injury/illness.[2]

Respondent, however, argues that the Proposed Termination form indicates that claimant's termination was the result of claimant failing to certify the absences under the FMLA. Karen Weaver, who was respondent's representative who investigated a grievance filed by the claimant for reinstatement because of a wrongful termination, was asked, if an injured employee was missing work because of a work-related injury, was he required to file for family medical leave to have the absences excused. Ms. Weaver answered, "I don't know if there's a different process between what has to be provided for work-related and FMLA**....**"[3] Donald Brewer testified , since claimant was claiming his absences were work-related, Central Medical had to verify the absences as excused absences. Mr. Brewer did not testify that FMLA certification was required for work-related absences. He also testified

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[2] Regular Hearing, January 10, 2001, Claimant's Exhibit No. 5 (includes the following documents referred to in the preceding paragraphs: (1) October 1, 1998, Notice of Corrective Counseling, (2) February 5, 1999, Corrective Action Memo, (3) December 16, 1999, Corrective Action Memo, (4) Proposed Termination form and, (5) Respondent's attendance policy entitled Wichita - "Attendance Standards.").

[3] Karen Weaver deposition, March 22, 2001, p. 26.

that claimant's supervisor could excuse employees from work and those absences should be excused and not subject to discipline.[4]

As a result of claimant being shifted back and forth between the FMLA office, Central Medical, and his supervisor in an attempt to obtain excused absences for being off because of a work-related injury, claimant received a memo from respondent's representative Janice McCrary of the FMLA office. That memo stated:

> Danny Christy was in my office this morning regarding days absent due to an occupational injury. I reviewed the Boeing policy regarding days absent due to an occupational injury. Danny has a clear understanding that if he has an occupational injury then he must go through Central Medical and/or the Boeing outside provider physician treating him for approval of absence, and not the FMLA Office.[5]

Here, the Board concludes, as did the ALJ, that respondent wrongfully terminated the claimant for violation of its attendance policy. Claimant's testimony and the exhibits admitted into the record support the conclusion that claimant was terminated as a result of his absences related to his work injury. Respondent's attendance policy specifically excludes work-related absences as unexcused absences that result in an unpaid absence charged against the employee as an infraction for the purpose of taking disciplinary action against the employee. Additionally, the Board finds respondent's policy of whether claimant is required to obtain certification under the FMLA for work-related absences is not understood by either the injured employee or respondent's management representatives. The Board concludes claimant is entitled to a work disability because he was not terminated for misconduct as held in Ramirez.[6] But, instead, the Board finds that respondent's termination of claimant was not made in good faith as found in Niesz.[7]

The Board also affirms the ALJ's finding that Dr. Philip R. Mills' opinions concerning claimant's permanent functional impairment and his task loss are more persuasive than the opinions of either Dr. Pedro Murati or Dr. Frederick Smith. Dr. Mills' 5 percent permanent functional impairment rating reflects a compromise between Dr. Smith's 3 percent and Dr. Murati's 10 percent rating. Additionally, Dr. Mills expressed a task loss opinion on both Jerry Hardin's and Karen Terrill's task loss assessment. The ALJ averaged Dr. Mills' 28 percent task loss opinion based on Mr. Hardin's analysis with his 18 percent opinion based on Ms. Terrill's analysis resulting in a 23 percent task loss opinion.

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[4] Donald Brewer deposition, March 22, 2001, p. 28.

[5] Regular Hearing, January 10, 2001, claimant's Exhibit No. 3.

[6] Ramirez v. Excel Corp., 26 Kan. App.2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889(1999).

[7] Niesz. v. Bill's Dollar Store, 26 Kan. App. 2d 737, Syl. ¶ 2, 993 P.2d 1246 (1999).

The Board finds Dr. Mills' 23 percent task loss opinion results from permanent work restrictions which better represent the claimant's disability as compared to the less limiting restrictions imposed by Dr. Smith and the more limiting restrictions imposed by Dr. Murati.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ John D. Clark's May 23, 2001, Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation